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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 KATHERINE ROCHA,

10 Plaintiff,

11 v.
12

13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.
16

No. 2:15-CV-00003-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
18 Nos. 12, 20. Attorney Cory J. Brandt represents Katherine Rocha (Plaintiff);
19 Special Assistant United States Attorney Alexis L. Toma represents the
20 Commissioner of Social Security (Defendant). The parties have consented to
21 proceed before a magistrate judge. ECF No. 19. After reviewing the
22 administrative record and briefs filed by the parties, the Court **GRANTS**
23 Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for
24 Summary Judgment.

25 **JURISDICTION**

26 Plaintiff applied for Disability Insurance Benefits (DIB) on February 5,
27 2012, alleging disability since March 19, 2011. Tr. 12. The application was
28 denied initially and upon reconsideration. Administrative Law Judge (ALJ) James

1 Sherry held a hearing on October 22, 2013, at which Plaintiff, represented by
2 counsel, testified as did vocational expert (VE) Trevor Duncan. Tr. 34-69. The
3 ALJ issued an unfavorable decision on December 2, 2013. Tr. 9-27. The Appeals
4 Council denied review. Tr. 1-5. The ALJ's December 2013 decision became the
5 final decision of the Commissioner, which is appealable to the district court
6 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
7 January 5, 2015. ECF Nos. 1, 3.

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized
11 here.

12 Plaintiff was 51 years old at the time of the hearing. Tr. 42. Plaintiff did not
13 graduate from high school, but obtained a general equivalency diploma (GED). Tr.
14 43. Plaintiff previously worked in preschools and a daycare; Plaintiff also worked
15 for a time as a school bus driver, a potato packager, and as an overnight stocker at
16 Walmart. Tr. 43, 47-50, 63. Plaintiff last worked as an in-home caretaker part-
17 time for six months, but had to stop working because she did not take a required
18 test. Tr. 45-46.

19 Plaintiff testified that she was unable to work because of knee pain, anxiety,
20 and depression. Tr. 51. Plaintiff testified that she gets anxious when she goes out
21 in public and when she is around other people. Tr. 51. Plaintiff testified that her
22 depression makes her feel like she's "stuck in a dark hole," makes it difficult for
23 her to sleep or concentrate, and leaves her without energy, motivation, or appetite.
24 Tr. 53-55. Plaintiff testified that she has feelings of worthlessness and she has lost
25 interest in things she used to enjoy, including crocheting, cross-stitching, and
26 reading. Tr. 55. Plaintiff rarely leaves the house by herself. Tr. 56. Plaintiff
27 testified that, for about twenty days each month, her anxiety and depression are so
28 bad that she cannot leave her house. Tr. 59. Plaintiff testified that depression

drove her to make one suicide attempt. Tr. 60.

Regarding her knee pain, Plaintiff testified that she had right knee replacement surgery, and, after physical therapy, her knee “felt 100 percent better than it did [prior to surgery].” Tr. 57. But Plaintiff’s knee still hurts, swells, and feels hot, and she has to elevate her leg a couple times a day. Tr. 57.

Plaintiff testified that she can only stand for about fifteen minutes at a time. Tr. 58. After standing, Plaintiff testified that she needs to sit for ten or fifteen minutes. Tr. 58. Plaintiff testified that she would only be able to stand for half an hour in an eight-hour workday. Tr. 58. Plaintiff stated that it was easier for her to walk than to stand in one place and she can walk for about half an hour or forty five minutes. Tr. 59-60.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence

1 supports the administrative findings, or if conflicting evidence supports a finding
 2 of either disability or non-disability, the ALJ's determination is conclusive.
 3 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

4 **SEQUENTIAL EVALUATION PROCESS**

5 The Commissioner has established a five-step sequential evaluation process
 6 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*
 7 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 8 proof rests upon claimants to establish a prima facie case of entitlement to
 9 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once
 10 claimants establish that physical or mental impairments prevent them from
 11 engaging in their previous occupations. 20 C.F.R. § 404.1520(a)(4). If claimants
 12 cannot do their past relevant work, the ALJ proceeds to step five, and the burden
 13 shifts to the Commissioner to show that (1) the claimants can make an adjustment
 14 to other work, and (2) specific jobs exist in the national economy which claimants
 15 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
 16 (2004). If claimants cannot make an adjustment to other work in the national
 17 economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(i-v).

18 **ADMINISTRATIVE DECISION**

19 On December 2, 2013, the ALJ issued a decision finding Plaintiff was not
 20 disabled as defined in the Social Security Act. Preliminarily, the ALJ found
 21 Plaintiff met the insured status requirements of the Social Security Act through
 22 December 31, 2015.

23 At step one, the ALJ found Plaintiff had engaged in substantial gainful
 24 activity from January 2012 to June 2012, but there was a continuous 12-month
 25 period during which Plaintiff did not engage in substantial gainful activity. Tr. 14.

26 At step two, the ALJ determined Plaintiff had the following severe
 27 impairments: severe osteoarthritis, right knee, status post total knee replacement in
 28 March 2011; left knee osteoarthritis, mostly asymptomatic; obesity; major

1 depressive disorder; and, panic disorder with agoraphobia. Tr. 14.

2 At step three, the ALJ found Plaintiff did not have an impairment or
3 combination of impairments that met or medically equaled the severity of one of
4 the listed impairments. Tr. 15.

5 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)
6 and determined she could perform a range of light work except:

7 [L]ift no more than 20 pounds at a time; frequently lift and carry 10
8 pounds; sit, stand and walk 6 hours out of an 8-hour workday;
9 unlimited push/pull within lifting restrictions; never climb ladders,
10 ropes, and scaffolds and crouch; occasionally climb ramps or stairs,
11 kneel, and crawl; frequently balance, and stoop; avoid concentrated
12 exposure to extreme cold and excessive vibration; avoid moderate
13 exposure to unprotected heights and use of moving machinery;
14 capable of simple, routine and repetitive tasks, some well learned
15 detailed tasks; can maintain attention and concentration for 2 hour
16 segments for simple and well learned tasks without more than
normally expected brief interruptions; is capable of superficial contact
with the general public; can interact with coworkers on specific work
related tasks.

17 Tr. 17. The ALJ concluded that Plaintiff was not able to perform her past relevant
18 work. Tr. 22.

19 At step five, the ALJ determined that, considering Plaintiff's age, education,
20 work experience and RFC, and based on the testimony of the vocational expert,
21 there were other jobs that exist in significant numbers in the national economy
22 Plaintiff could perform, including the jobs of production assembler, cashier II, and
23 fast food worker. Tr. 24. The ALJ thus concluded Plaintiff was not under a
24 disability within the meaning of the Social Security Act at any time from March
25 19, 2011, through the date of the ALJ's decision. Tr. 24.

26 ISSUES

27 The question presented is whether substantial evidence supports the ALJ's
28 decision denying benefits, and, if so, whether that decision is based on proper legal

standards. Plaintiff contends the ALJ erred by (1) improperly rejecting the opinions of Plaintiff's treating and examining medical providers; (2) improperly rejecting Plaintiff's testimony about the severity of her symptoms; and, (3) failing to make adequate findings at step five.

DISCUSSION

A. Credibility

Plaintiff contests the ALJ's adverse credibility determination. ECF No. 12 at 12-17.

It is generally the province of the ALJ to make credibility determinations, *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

The ALJ found Plaintiff not fully credible concerning the intensity, persistence, and limiting effects of her symptoms. Tr. 21. The ALJ reasoned that Plaintiff was less than credible because her symptom reporting was inconsistent with (1) objective medical evidence and the fact that her impairments could be controlled with medication, (2) her history of conservative treatment, (3) her normal presentation at medical appointments, (4) her lack of regular mental health treatment, and (5) her activities of daily living.

1. Objective evidence and improvement with medication

The ALJ noted that medical evidence did not demonstrate Plaintiff's impairments caused total disability and that medications generally controlled her mental impairments. Tr. 21 (citing Tr. 368, 369, 370-71, 376).

Objective medical evidence is a "relevant factor in determining the severity

1 of the claimant's pain and its disabling effects," but it cannot serve as the sole
2 ground for rejecting a claimant's credibility. *Rollins v. Massanari*, 261 F.3d 853,
3 857 (9th Cir. 2001). Furthermore, the fact that a condition can be remedied by
4 medication is a legitimate reason for discrediting an opinion. *Warre v. Comm'r of*
5 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

6 The ALJ's reasoning that Plaintiff's alleged disability is unsupported by
7 objective medical evidence and that her impairments have improved with
8 medication are clear and convincing reasons to discredit Plaintiff. As noted by the
9 ALJ, x-rays of Plaintiff's right knee showed that her knee was stable after surgery.
10 Tr. 376. The ALJ also noted Dr. Wheaton's opinion that Plaintiff was capable of
11 working with some restrictions that would last for less than a year. Tr. 21 (citing
12 Tr. 326). And although Plaintiff historically had problems with her medication, in
13 Plaintiff's most recent treatment notes, she reported that Effexor and Lorazepam
14 effectively controlled her depression and anxiety. Tr. 368, 370. These are clear
15 and convincing reasons to discredit Plaintiff.

16 **2. Conservative treatment**

17 The ALJ noted that Plaintiff's treatment was mostly routine and/or
18 conservative in nature. Tr. 21.

19 Conservative treatment can be "sufficient to discount a claimant's testimony
20 regarding [the] severity of an impairment." *Parra v. Astrue*, 481 F.3d 742, 751
21 (9th Cir. 2007).

22 The Court finds the ALJ partially erred in concluding that Plaintiff's
23 treatment was mostly routine and/or conservative. As discussed *infra*, Plaintiff
24 received limited treatment for her depression and anxiety, and this treatment was
25 limited to medication management and two counseling sessions. Much of the
26 record regarding Plaintiff's physical impairments, however, involves treatment
27 Plaintiff received after her total right knee replacement, a surgery which cannot be
28 classified as conservative or routine treatment. Thus, the ALJ did not err in

1 discrediting Plaintiff based on conservative treatment for her mental impairments,
2 but this reasoning is inapplicable to her physical impairments.

3 **3. Normal presentations**

4 The ALJ found Plaintiff's reporting of depression and suicidal thoughts
5 inconsistent with treatment notes indicating that Plaintiff presented normally to her
6 health care providers. Tr. 21 (citing Tr. 298).

7 In determining a claimant's credibility, the ALJ may consider "ordinary
8 techniques of credibility evaluation, such as the claimant's reputation for lying,
9 prior inconsistent statements . . . and other testimony by the claimant that appears
10 less than candid." *Smolen*, 80 F.3d at 1284.

11 The ALJ did not err in using Plaintiff's normal presentations at her medical
12 appointments to discredit Plaintiff. As noted by the ALJ, some of Plaintiff's
13 treatment notes, especially Plaintiff's most recent treatment notes, indicate that
14 Plaintiff presented to her medical appointments without signs of depression. *See*
15 Tr. 298, 366, 368, 369, 370. These observations are inconsistent with Plaintiff's
16 allegations of disabling depressive symptoms and suggest that Plaintiff's
17 depression is substantially controlled. Plaintiff is accurate in arguing that, for a
18 period of time, between approximately May 2011 and November 2011, treatment
19 notes reflect that Plaintiff did present with a depressed mood and blunted affect.
20 ECF No. 12 at 15 (citing Tr. 288, 291, 293, 298, 300, 330, 332, 356). These
21 observations corroborate Plaintiff's allegations. But given the inconsistent
22 evidence, the Court must defer to the ALJ's interpretation, which is substantially
23 supported. *Tackett*, 180 F.3d at 1097.

24 **4. Lack of regular mental health treatment**

25 The ALJ noted that Plaintiff only sought mental health treatment on "a very
26 infrequent basis" and reasoned, "If [Plaintiff's] health problems were not severe
27 enough to motivate her to follow through with treatment, it is difficult to accept
28 that they are disabling." Tr. 21.

1 Unexplained or inadequately explained reasons for failing to seek medical
2 treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. § 404.1530;
3 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

4 The ALJ did not err in reasoning that Plaintiff's lack of regular mental health
5 treatment suggested that Plaintiff's impairments were not as severe as she alleged.
6 Treatment notes indicate Plaintiff has a history of depression. *See, e.g.*, Tr. 303
7 (treatment note dated March 11, 2011, noting Plaintiff's depression "stable"). In
8 the time period relevant to this case, the record reflects that Plaintiff sought
9 treatment for depression from her primary care provider on six occasions: May 19,
10 2011, July 18, 2011, October 6, 2011, October 21, 2011, October 26, 2011, and
11 November 9, 2011. Tr. 288, 290, 292, 295 297, 299. Plaintiff attended counseling
12 sessions on October 27, 2011, and November 4, 2011, Tr. 327-332, but apparently
13 discontinued counseling because she was not sure "what [she was] supposed to get
14 out of [it]," Tr. 331. After November 2011, Plaintiff apparently did not seek
15 mental health treatment for over a year. Plaintiff again alleged depressive
16 symptoms at approximately five appointments between April 16, 2013, and July
17 22, 2013. Tr. 365-71. These appointments were primarily related to treatment
18 involving a lipoma on Plaintiff's back, but Plaintiff's treating source also made
19 adjustments to Plaintiff's medication for her depression and anxiety. Given the
20 significant gap in treatment between November 2011 and April 2013, and the fact
21 that Plaintiff declined to pursue counseling, the ALJ did not err in discrediting
22 Plaintiff based on her lack of mental health treatment.

23 Plaintiff argues that her failure to seek treatment can be excused given the
24 fact that her suicidal thoughts increased when she started taking anti-depressants,
25 causing her "to develop an aversion to treatment through prescription drugs and
26 counseling." ECF No. 12 at 16. While this may have been Plaintiff's subjective
27 rationale for not seeking treatment, it is not supported by the administrative record.
28 Rather, the record indicates, although Plaintiff's treatment providers stopped

1 prescribing her Wellbutrin, Plaintiff continued to take other medications until her
2 treating sources eventually found the right combination and dosage of medications
3 to effectively control Plaintiff's depression and anxiety. *See* Tr. 368-71.
4 Plaintiff's rationale further does not seem to excuse her failure to seek counseling.
5 Counseling does not appear to have played a role in Plaintiff's overdose and
6 Plaintiff apparently found counseling unnecessary. *See* Tr. 331 (at Plaintiff's
7 second, and final, counseling session she stated that she was not sure "what [she
8 was] supposed to get out of [counseling]").

9 **5. Activities of daily living**

10 The ALJ found Plaintiff's activities inconsistent with her reports of disabling
11 limitations and symptoms. Tr. 21. The ALJ noted Plaintiff was able to go on daily
12 twenty minute walks and care for her grandchildren and her son's girlfriend's son.
13 Tr. 21 (citing Tr. 320, 331). The ALJ also noted that Plaintiff worked for six
14 months as a home health aide, and such employment ended because Plaintiff did
15 not take a test within the required timeframe. Tr. 22.

16 A claimant's daily activities may support an adverse credibility finding if (1)
17 the claimant's activities contradict his or her other testimony, or (2) "the claimant
18 is able to spend a substantial part of his day engaged in pursuits involving
19 performance of physical functions that are transferable to a work setting." *Orn v.*
20 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603). "The ALJ
21 must make 'specific findings relating to [the daily] activities' and their
22 transferability to conclude that a claimant's daily activities warrant an adverse
23 credibility determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
24 Cir. 2005)). A claimant need not be "utterly incapacitated" to be eligible for
25 benefits. *Fair*, 885 F.2d at 603.

26 The ALJ partially erred in finding Plaintiff's activities inconsistent with her
27 symptom reporting. The ALJ erred in finding Plaintiff's daily walks were
28 inconsistent with her symptom reporting. At the hearing, Plaintiff testified that she

1 can walk for about half an hour or forty five minutes. Tr. 59-60. Plaintiff
2 consistently reported her ability to walk and the ALJ made no finding that being
3 able to walk for twenty to forty five minutes was a task transferable to a work
4 setting. Furthermore, the ALJ made no specific findings about how Plaintiff's care
5 of her grandchildren was inconsistent with her testimony or involved tasks
6 transferrable to a work setting. Simply because the children were difficult and the
7 babysitting schedule was somewhat unpredictable does not necessarily mean that
8 Plaintiff engaged in activity inconsistent with her testimony or which involved
9 tasks transferable to a work setting. *See Fair*, 885 F.2d at 603 (claimant need not
10 be "utterly incapacitated" to be eligible for benefits).

11 The ALJ's finding that Plaintiff was able to work during her alleged
12 disability is a specific, clear, and convincing reason for discrediting Plaintiff.
13 Plaintiff testified that she worked as an in-home caretaker part-time for six months,
14 but had to stop working because she did not take a required test. Tr. 45-46. Even
15 though this was not full time work, the ALJ was still allowed to consider it in
16 evaluating Plaintiff's credibility and did not err in finding that such work was
17 inconsistent with Plaintiff's reporting of disabling symptoms. *See Bray v.*
18 *Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (claimant's ability
19 to work can be considered in assessing credibility). The ALJ's finding is bolstered
20 by the fact that Plaintiff stopped this work for reasons other than her alleged
21 disability. *See Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (ALJ
22 properly relied on the fact that claimant left his job because he was laid off, rather
23 than because he was injured, in finding the claimant not entirely credible). The
24 fact that Plaintiff worked part time for six months during her alleged disability is a
25 specific, clear, and convincing reason to discredit Plaintiff.

26 **6. Conclusion**

27 Some of the reasons provided by the ALJ were not specific, clear, and
28 convincing reasons to discredit Plaintiff. Specifically, the ALJ erred in finding

1 Plaintiff underwent only conservative treatment and by failing to provide specific
2 reasons for how Plaintiff's ability to go on walks and care for her grandchildren
3 was inconsistent with her symptom reporting or involved tasks transferrable to a
4 work setting. These errors are harmless, however, given the number of other
5 specific, clear, and convincing reasons provided by the ALJ to discredit Plaintiff.
6 *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is
7 harmless when "it is clear from the record that the . . . error was inconsequential to
8 the ultimate nondisability determination"); *Carmickle v. Comm'r, Soc. Sec.*
9 *Admin.*, 533 F.3d 1160, 1163 (9th Cir. 2008) (upholding adverse credibility finding
10 where ALJ provided four reasons to discredit claimant, two of which were invalid).

11 **B. Evaluation of Medical Evidence**

12 Plaintiff argues the ALJ failed to give adequate weight to the limitations
13 assessed by John Wheaton, M.D., one of Plaintiff's treating physicians, and
14 Thomas Genthe, Ph.D., an examining psychologist. ECF No. 12 at 10-12.

15 "In making a determination of disability, the ALJ must develop the record
16 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barnhart*, 341 F.3d
17 1006, 1012 (9th Cir. 2003).

18 In weighing medical source opinions, the ALJ should distinguish between
19 three different types of physicians: (1) treating physicians, who actually treat the
20 claimant; (2) examining physicians, who examine but do not treat the claimant;
21 and, (3) nonexamining physicians who neither treat nor examine the claimant.
22 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
23 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
24 631. The ALJ should give more weight to the opinion of an examining physician
25 than to the opinion of a nonexamining physician. *Id.*

26 When a physician's opinion is not contradicted by another physician, the
27 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*
28 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is

1 contradicted by another physician, the ALJ is only required to provide “specific
2 and legitimate reasons” for rejecting the opinion of the first physician. *Murray v.*
3 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

4 **1. John Wheaton, M.D.**

5 Dr. Wheaton is an orthopedic specialist who performed Plaintiff’s right total
6 knee arthroplasty and treated Plaintiff on a number of occasions post-surgery. *See*
7 Tr. 320-26, 333. In May 2011, Dr. Wheaton opined that Plaintiff could return to
8 work with the following limitations: “No ladders or kneeling,” “No squatting more
9 than 1 hour per shift,” and “No pushing, pulling, or lifting greater than 30 pounds.”
10 Tr. 326. Dr. Wheaton stated that these limitations would “all be enforced until
11 September 1, 2011.” Tr. 326. In April 2012, Dr. Wheaton opined that Plaintiff
12 was “unable to kneel.” Tr. 333.

13 Plaintiff argues that the ALJ ignored the limitations assessed by Dr.
14 Wheaton, including her need to avoid ladders and kneeling. ECF No. 12 at 11.
15 Defendant notes that the ALJ discussed Dr. Wheaton’s assessments, but Defendant
16 concedes that the ALJ failed to weigh them. ECF No. 20 at 13 (citing Tr. 19).
17 Defendant argues that any error made by the ALJ was harmless, however, as Dr.
18 Wheaton opined that the limitations would only last for about four months, the
19 ALJ accounted for most of the limitations assessed by Dr. Wheaton, and because
20 the jobs identified by the ALJ at step five do not involve kneeling. *Id.* at 14.

21 The Court finds any error made by the ALJ to be harmless for the reasons
22 argued by Defendant. While the opinions of a treating physician are generally
23 entitled to deference, even if the ALJ had given controlling weight to the
24 limitations assessed by Dr. Wheaton, the ALJ’s ultimate nondisability
25 determination would not be affected. Therefore, the error was harmless.

26 First, Dr. Wheaton estimated the limitations he assessed in May 2011 would
27 need to be enforced only until September 2011. Plaintiff’s surgery was in April
28 2011 and it is reasonable to presume that these limitations began immediately after

1 her surgery. If, as estimated by Dr. Wheaton, these limitations lasted into
2 September 2011, the record supports that Plaintiff's limitations assessed by Dr.
3 Wheaton at Tr. 326 lasted for five to six months. This is not long enough to
4 establish disability. *See* 42 U.S.C. § 1382c(a)(3)(A) (disability must be premised
5 on medically determinable physical or mental impairments that have "lasted or can
6 be expected to last for a continuous period of not less than twelve months").

7 Second, the ALJ's RFC determination generally accounted for Plaintiff's
8 lifting, pushing, pulling limitations, and Dr. Wheaton's opinion that Plaintiff
9 should never climb ladders. *Compare* Tr. 17 *with* Tr. 326.

10 Finally, even if the ALJ had credited Dr. Wheaton's April 2012 opinion that
11 Plaintiff "is unable to kneel," Tr. 333, this limitation would not preclude Plaintiff
12 from performing the jobs identified by the VE, Tr. 64-65, because none of these
13 jobs involve kneeling. *See* Dictionary of Occupational Titles 706.687-010, 1991
14 WL 679074 (production assembler), 211.462-010, 1991 WL 671840 (cashier II),
15 311.472-010, 1991 WL 672682 (fast food worker).

16 In conclusion, the error made by the ALJ in failing to give weight to Dr.
17 Wheaton's opinions is harmless.

18 **2. Thomas Genthe, Ph.D.**

19 Dr. Genthe completed a psychological evaluation of Plaintiff in August
20 2012. Tr. 353-57. Dr. Genthe diagnosed Plaintiff with major depressive disorder
21 and panic disorder with agoraphobia. Tr. 356. Dr. Genthe concluded

22 [Plaintiff's] ability to understand and remember short, simple
23 instructions was assessed as good. Her ability to understand and
24 remember detailed instructions was assessed as fair. Her ability to
25 carry out short, simple instructions was assessed as good. Her ability
26 to carry out detailed instructions was assessed as fair. Her ability to
27 sustain an ordinary routine without supervision was assessed as good
28 to fair. Her ability to work with or near others without being
distracted by them was assessed as fair. Her ability to respond
appropriately to changes in the work setting was assessed as fair.

1 From a social perspective, [Plaintiff's] ability to interact appropriately
2 with the public was assessed as fair. Her ability to get along with
3 coworkers and/or peers was assessed as fair, and her ability to respond
4 appropriately to criticism from supervisors as fair.

5 [Plaintiff's] prognosis is viewed as fair. At this time, she is unlikely
6 to function adequately in a work setting until her psychological
7 symptoms have been managed more effectively. Given her response
8 to treatment, and willing participation, a period of 3-6 months may
9 likely be sufficient to address her treatment needs at least moderately
well, and help her regain the necessary emotional functioning to
resume fulltime work related activities.

10 Tr. 357.

11 The ALJ gave some weight to Dr. Genthe's opinions. Tr. 22. The ALJ
12 rejected Dr. Genthe's conclusion that Plaintiff is unlikely able to function
13 adequately until she receives treatment. Tr. 22. The ALJ found this conclusion
14 inconsistent with Dr. Genthe's normal mental status examination and the fact that
15 Plaintiff reported that her physical condition was the primary reason why she was
16 unable to work. Tr. 22. The ALJ further found that other records indicated that
17 Plaintiff's depression and anxiety were improved and controlled. Tr. 22.

18 Plaintiff argues that the ALJ ignored Dr. Genthe's conclusion that Plaintiff
19 was unable to work without treatment and erred in reasoning that Dr. Genthe relied
20 on Plaintiff's self-reported symptoms. ECF No. 12 at 11-12. Defendant concedes
21 that the ALJ erred in reasoning that Plaintiff reported primarily physical
22 impairments and not mental impairments, ECF No. 20 at 15 (citing Tr. 353), but
23 argues that the error was harmless in light of the ALJ's other reasons, *id.*

24 The Court finds that the ALJ did not err in evaluating Dr. Genthe's opinions
25 and provided specific and legitimate reasons for rejecting Dr. Genthe's conclusion
26 that Plaintiff was unable to work without further treatment. Plaintiff appears to be
27 mistaken when she argues that the ALJ rejected Dr. Genthe's opinion on account
28 of Plaintiff's unreliable reporting; the ALJ did not cite this as a reason to reject Dr.

1 Genthe's opinion. The ALJ did not err in noting inconsistencies between the
 2 results of Dr. Genthe's "fairly normal" mental status exam and his ultimate
 3 conclusion. Tr. 22, 355-57; *see Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
 4 2005) (finding that an ALJ may cite internal inconsistencies in evaluating a
 5 physician's report). The ALJ also did not err in reasoning that, contrary to Dr.
 6 Genthe's opinion, Plaintiff reported that her depression and anxiety were improved
 7 and controlled. Tr. 22; *see also* Tr. 366-71. The fact that a condition can be
 8 remedied by medication is a legitimate reason for discrediting an opinion. *Warre*,
 9 439 F.3d at 1006. The ALJ provided specific and legitimate reasons for rejecting
 10 Dr. Genthe's opinion that Plaintiff would be likely be unable to work without
 11 treatment.

12 **C. RFC and Hypothetical Question**

13 Plaintiff argues that the ALJ did not account for all of Plaintiff's limitations
 14 in the ALJ's RFC determination and inquiries to the VE. ECF No. 12 at 17-18.
 15 Plaintiff argues that ALJ should have included limitations regarding kneeling,
 16 standing, and psychological symptoms. *Id.* Plaintiff also argues that ALJ should
 17 have found her limited to sedentary work. *Id.* at 18.

18 A claimant's RFC is "the most [a claimant] can still do despite [her]
 19 limitations." 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P,
 20 Appendix 2, § 200.00(c) (defining RFC as the "maximum degree to which the
 21 individual retains the capacity for sustained performance of the physical-mental
 22 requirements of jobs."). In formulating a RFC, the ALJ weighs medical and other
 23 source opinions and also considers the claimant's credibility and ability to perform
 24 daily activities. *See, e.g., Bray*, 554 F.3d at 1226.

25 In this case, the ALJ found Plaintiff had the RFC to perform a range of light
 26 work except:

27 [L]ift no more than 20 pounds at a time; frequently lift and carry 10
 28

1 pounds; sit, stand and walk 6 hours out of an 8-hour workday;
2 unlimited push/pull within lifting restrictions; never climb ladders,
3 ropes, and scaffolds and crouch; occasionally climb ramps or stairs,
4 kneel, and crawl; frequently balance, and stoop; avoid concentrated
5 exposure to extreme cold and excessive vibration; avoid moderate
6 exposure to unprotected heights and use of moving machinery;
7 capable of simple, routine and repetitive tasks, some well learned
8 detailed tasks; can maintain attention and concentration for 2 hour
9 segments for simple and well learned tasks without more than
10 normally expected brief interruptions; is capable of superficial contact
11 with the general public; can interact with coworkers on specific work
12 related tasks.

13 Tr. 17. When the ALJ asked the VE if someone with Plaintiff's background and
14 these limitations was capable of working, the VE testified that such a person could
15 work as a production assembler, cashier II, or a fast food worker. Tr. 64-65.

16 The Court concludes that the ALJ's RFC determination is supported by
17 substantial evidence and not based on legal error. The nonexertional social and
18 cognitive limitations contained in Plaintiff's RFC are essentially the same as those
19 assessed by Dr. Genthe. *Cf.* Tr. 357. And as discussed *supra*, any error the ALJ
20 made in not giving weight to Dr. Wheaton's opinions concerning Plaintiff's ability
21 to kneel, and other (temporary) limitations, Tr. 327, 333, is harmless. Finally,
22 although Plaintiff testified that she can only stand for about fifteen minutes at a
23 time or for half an hour in an eight-hour workday, Tr. 58, such a severe limitation
24 is not supported by the record and the ALJ did not err in finding Plaintiff's
25 symptom reporting less than credible. Likewise, Plaintiff fails to point to any
26 evidence—other than her own testimony—supporting her argument that she is
27 limited to sedentary work. As the ALJ's hypothetical question to the VE mirrored
28 the ALJ's RFC determination, the Court further finds that the ALJ's inquiries to
the VE were also proper. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th
Cir. 2001) (ALJ is only required to present the VE with those limitations the ALJ
finds to be credible and supported by the evidence).

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is supported by substantial evidence and free of legal error.

Accordingly, **IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant** and the file shall be **CLOSED**.

DATED September 28, 2015.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE